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Therefore there can be no inherent objection to the act of a corporation in *holding* its own shares, and the dispute is reduced again to the question whether or not the use of the corporation capital in *purchasing* its own stock is a power which it impliedly possesses. And this, as we have shown above, is a matter of hopeless conflict as far as authorities go, though it is submitted that such power can be sustained on theory, and is of immense practical convenience, if so adopted.

W. L. M.

Landowners' Rights in Percolating Water.

In *Meeker* v. *City of East Orange*,[1] the Court of Errors and Appeals of New Jersey refused to follow what is undoubtedly the law of England, and probably the law of a majority of the American jurisdictions, as to percolating water. The general rule is that the owner of the soil may intercept and divert the percolating waters, without liability to the owners of land in the neghborhood through whose lands the water so diverted or intercepted would have flowed or percolated.[2] This is true, notwithstanding the fact that the consequences of his act in so diverting or intercepting the percolating water would be to injure or even render entirely worthless another's well, spring or surface watercourse.[3]

The present law of England on this subject is settled by two leading cases, the first of which is *Acton* v. *Blundell*,[4] in which the court held that the question of percolating water "falls within the principle which gives to the owner of the soil all that lies beneath the surface; the land immediately below is his property, whether it is solid rock, or porous ground or venous earth, or part soil, part water; the person who owns the soil may dig through and apply all that is found there to his own purposes at his free will and pleasure. If in the exercise of such right, he intercepts or drains off the water collected from underground springs in his neighbor's well, this inconvenience to his neighbor falls within the description of *damnum absque injuria.*"

The second of the leading English cases is *Chasemore* v.

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[1] 74 Atl. 379.

[2] *Acton* v. *Blundell*, 12 M. & W. 324 (1843); *Chasemore* v. *Richards*, 7 H. L. Cas. 349 (1860); *Edwards* v. *Haeger*, 180 Ill. 99; *Brown* v. *Kistler*, 190 Pa. 499.

[3] *Edwards* v. *Haeger, supra; Chasemore* v. *Richards, supra.*

[4] 12 M. &. W. See also Angell on Watercourses, sec. 109-114a.

Richards.[5] In that case, the plaintiff was the occupier of an ancient mill on the River Wandle. He and his predecessors had for more than sixty years used and enjoyed as of right the flow of the river. The river was supplied above the plaintiff's mill, by the rainfall on a district many thousand acres in extent, comprising the town of Croydon and its vicinity. This water percolated through the earth and found its way to the stream. The defendants had pumped water by means of wells on their own lands, to be used for supplying the town of Croydon with water. The House of Lords decided that the plaintiff could not recover, in spite of the serious damage to his mill.

These two cases have been generally followed, in the majority of American jurisdictions.[6] The trend of modern authority, however, seems to be to apply to percolating water the same principles which apply in the case of surface streams and subterranean water flowing in a defined chattel, *i. e.*, that each landowner may make a reasonable use of the water for the purposes of his plot of land, paying due regard to the rights of the other landowners. Thus, in *Gould* v. *Eaton,*[7] the English rule was followed, while in later cases in the same state the doctrine of reasonable correlative rights has been applied.[8] In a comparatively recent case in New York, *Forbell* v. *New York,*[9] it was held that the draining of land of a private proprietor by a city pumping station which exhausts from all the region thereabout the natural supply of subsurface water and thus prevents the raising on it of crops to which it was peculiarly adapted, or destroys such crops after they are grown or partly grown, renders the city liable to the owner for damages which he sustains and entitles him to an injunction against the wrong. The decision in this case is based on reasonable use. Earlier cases in New York followed the rule of *Acton* v. *Blundell.*[10]

The New Jersey Court, in referring to the case of *Acton* v. *Blundell* and the reasoning on which it is based, argues: "The impracticability of applying the rule of absolute ownership to the fluid water, which by reason of its nature is incapable of being subjected to such ownership, is apparently overlooked.

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[5] 7 H. L. Cas. 349.

[6] 30 A. & E. Encyc. of Law (2nd Ed.) 312-313 and cases there cited.

[7] 111 Calif. 639.

[8] See *Katz* v. *Walkinshaw,* 141 Calif. 116.

[9] 164 N. Y. 522.

[10] *Ellis* v. *Duncan,* 21 Barb. (N. Y.) 230; *Van Wycklen* v. *Brooklyn,* 118 N. Y. 424.

If the owner of Whiteacre is the absolute owner of all the percolating water found beneath the soil, the owner of neighboring Blackacre must . . . have the like proprietorship in his own percolating water. How then can it be consistent with declared principles to allow the owner of Whiteacre to withdraw by pumping or otherwise, not only all the percolating water that is normally subjacent to his own soil, but also, at the same time the whole or a part of that which is normally subjacent to Blackacre? . . . Again, the denial of the applicability to underground waters of the general principles of law that obtain with respect to waters on the surface of the earth, is based, in part upon the mere difficulty of proving the facts respecting waters that are concealed from view; but experience has demonstrated in a multitude of cases that this difficulty is often readily solved, and when it is solved in a given case by the production of the necessary proof, this reason for the rule at once vanishes. It is sometimes said that unless the English rule be adopted, landowners will be hampered in the development of their property because of the uncertainty that would be thrown about their rights. It seems to us that this reasoning is wholly faulty. If the English rule is to obtain, a man may discover upon his own land springs of great value for medicinal purposes or for use in special forms of manufacture, and may invest large sums upon their development; yet he is subject at any time to have the normal supply of such springs wholly cut off by a neighboring landowner." The Court further remarks that their decision "does not prevent the proper user by any landowner of the percolating waters subjacent to his soil in agriculture, manufacturing, irrigation or otherwise; nor does it prevent any reasonable development of his land by mining or the like, although the underground water of neighboring proprietors may be interfered with or diverted. But it does prevent the withdrawal of underground waters for distribution or sale for uses not connected with any beneficial ownership or enjoyment of the land whence they are taken, if it thereby results that the owner of the adjacent . . . land is interfered with in his right to the reasonable user of subsurface water upon his land or if his wells, springs or streams are thereby materially diminished in flow or his land is rendered so arid as to be less valuable for agriculture, pasturage or other legitimate use."

The reasoning in the above case is so sound, and the cases in England and America are reviewed in the opinion so thoroughly that extended comment would be superfluous. Questions as to percolating waters most frequently arise where

there is a basin filled with saturated earth. In nearly all other instances where a number of persons have a qualified right to the same natural product, the doctrine of reasonable user is applied. It is applied in the case of flowing streams, on the surface or beneath the surface. Why should it not be applied to percolating waters? The decision is based on correct legal principles, is desirable from an economic viewpoint, and without doubt represents the trend of modern authority in the American states.[11]

E. A. L.

NEGLIGENCE AS THE PROXIMATE CAUSE OF INJURY.

Where a statute imposes a legal duty, the violation of which results in injury to a third person, in determining whether such violation is the proximate cause of the injury we must take the object of the statute into consideration; and if the very contingency happened which the statute was designed to prevent, the tort-feasor ought not to be relieved of the consequences of his act unless he can show that the injury was in no way probable nor reasonably to be anticipated.

In a recent case, *The Santa Rita,*[1] the facts, briefly stated, were as follows: A steamer, *The Santa Rita,* was lying beside a wharf, discharging a cargo of iron pipe. A large quantity of fuel oil had escaped into the hold of the steamer, which was pumped into the waters of the bay, in violation of a penal statute. The oil floated on the water under the wharf and around the libellant's ship, the *Boieldieu,* lying near *The Santa Rita.* From some unknown cause, either from the spark of an engine on the wharf, or from live coals taken from the engine and thrown into the bay, or from fire on the wharf itself communicated to the oil on the water, the oil caught fire, and damaged the *Boieldieu.* It was *held,* that the act of the *Santa Rita* in discharging the oil into the bay was not the proximate cause of the injury, nor a concurrent cause, but only created a condition, which made the subsequent fire, which was deemed the proximate cause, more disastrous, and that she was not liable for the injury.

It is difficult to reconcile some of the authorities relied upon by the court to support its conclusions. Certainly, the mere

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[11] See also Washburn on Easements, 363-390; 48 Cent. Dig. sec. 110 *et seq.* For later cases see Farnham on Waters: Ch. 30; Note in 64 L. R. A. 236.

[1] 173 Fed. Rep. 413 (Dec. 16, 1909).